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Supreme Court, U.S.
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No. 93-338

In The

Supreme Court of the United States

October Term, 1993

LAKE FOREST DEVELOPMENTS,

Petitioner,

vs.

FIRST GIBRALTAR BANK, FSB,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Lake Forest established the existence of an agreement complying with the mandates of *D'Oench, Duhme* which varied the terms of the written agreements between Lake Forest and Gibraltar Savings Association, the closed institution.

2. Whether Gibraltar Savings Association breached the written agreements with Lake Forest by seeking a personal guaranty from John W. McMackin.

3. Whether Lake Forest waived its claims asserted in this Court by failing to raise them in its pleadings below.

LIST OF PARTIES

Petitioner:

Lake Forest Developments

Respondent:

First Madison Bank, FSB, f/k/a First Gibraltar Bank, FSB[1]

1. The Federal Savings and Loan Insurance Corporation was involved from the date of removal until August 9, 1989, the effective date of FIRREA. Thereafter, the Federal Deposit Insurance Corporation as Manager of Federal Savings and Loan Insurance Corporation Resolution Fund, as Receiver for Gibraltar Savings Association became involved as a party to the suit until Order for Summary Judgment was entered on March 26, 1991. No appeal was taken from this Order.

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No. 93-338

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LAKE FOREST DEVELOPMENTS,

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FIRST GIBRALTAR BANK, FSB,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, First Madison Bank, FSB, f/k/a First Gibraltar Bank, FSB ("First Gibraltar") respectfully files this Brief in Opposition to the Petition for Writ of Certiorari of Petitioner Lake Forest Developments ("Lake Forest") and would show as follows:

STATEMENT OF CASE

On March 30, 1977, Gibraltar Savings Association ("GSA") entered into a loan agreement (the "Loan Agreement") with

Johnson-Loggins, Inc., to finance development of 74 acres of real property in Denton County, Texas for residential use. The Loan Agreement set forth Johnson-Loggins' obligations to submit a master development plan for GSA's approval, to be followed by more specific section plans and budgets for the parts of the property that were to be platted, showing detailed plans for streets, utility lines, etc. Section 2.02(a) of the Loan Agreement provided in part:

> [GSA] shall be obligated to furnish to [Johnson-Loggins] the amount of funds required to discharge and pay the costs of acquisitions and holding of the said property, to pay taxes, insurance and other specific direct costs of the development as set out in Section 3.04 hereinafter . . . [GSA] shall not be obligated to advance in excess of eighty percent (80%) of the appraised value of the subject property according to the appraisal submitted to and accepted by [GSA]. *[GSA] shall not accept a reappraisal at a later date in order to increase the amount of funds to be advanced hereunder.*

(emphasis added). The direct costs listed in Section 3.04 included, *inter alia* the cost of land, cost of improvements, property taxes, advertising and sales expenses, and recording and title fees. Section 5.01 provided that the debt was to be nonrecourse, with GSA looking for repayment solely to the property and other security provided. On the same day, Johnson-Loggins executed a $1.8 million promissory note to GSA reflecting advances that it was contemplated GSA would thereafter periodically make for expenses in developing the property. The note also reflected that the debt was nonrecourse, with GSA agreeing to look solely to the mortgage described in a deed of trust executed contemporaneously by Johnson-Loggins for repayment.

Several months later, the Loan Agreement was assigned to Lake Forest, a joint venture formed by John W. McMackin ("McMackin") and Robert West ("West") to develop and ultimately sell the property. In October, 1977, McMackin, on behalf of Lake Forest, submitted to GSA a plan and basic budget for the first phase of development of the property. The first phase included development of 22.2 acres. A November 7, 1977 GSA memorandum reflects GSA's assent to proceed based on the plan submitted by McMackin.

In January, 1979, McMackin submitted to GSA a plan and budget for the second phase of development. This plan included a request for additional funds based on a reappraisal of part of the property. A GSA memorandum dated January 11, 1979 discussing this proposal shows that the property is divided into three parcels, and that Parcel 1, on which it was originally contemplated that there would be 62 lots, had been reconfigured so that it would contain 106 lots. As a consequence of this changed land plan, a new appraisal of Parcel 1 had been performed, resulting in a new total appraised value for all three tracts of $3,015,591.00. The memorandum reflects that the "Loan Request at 80%" based on the new appraisal was $2,412,470.00, representing a request for new funds in the amount of $610,870.00. The plan, budget, and request were all approved by GSA.

On May 29, 1979, Lake Forest executed a promissory note to GSA in the amount of $2.96 million, renewing and extending the original $1.8 million loan. Like the previous note, this note reflected that it evidenced a nonrecourse debt and was accompanied by a deed of trust on the property.

In late 1980, Lake Forest sought further development funding that would have increased the total loan amount to approximately $3.3 million. A November 14, 1980 GSA memorandum summarizing the request shows the requested amount to be eighty

percent (80%) of the property value as calculated in an October, 1980 appraisal. A memorandum dated February 9, 1981 reflects that Ackerman had met with McMackin and was making the following recommendations (among others) for changes in the Loan Agreement when it was extended: (1) that McMackin would be 100% liable for the loan balance, and (2) that GSA would have no further obligation to make future loans. According to a GSA memo dated February 10, 1981, the GSA loan committee approved the refinancing on the conditions suggested by Ackerman, including personal liability by McMackin. McMackin submitted to the district court documents that he claims GSA demanded that he sign in order to receive the requested additional funding for Lake Forest. These documents included a full personal guaranty of the new loan and a termination of the March, 1977 loan agreements.

McMackin refused to sign these documents. On August 11, 1981, Lake Forest filed suit in Texas state court against GSA for breach of contract, seeking specific performance or damages. Lake Forest subsequently defaulted in its payments on the May, 1979 note, and GSA foreclosed and purchased the property at a trustee's sale on June 7, 1983. GSA also foreclosed upon and subsequently purchased, at two judicial sales, a total of twenty-seven promissory notes that Lake Forest had collaterally assigned to GSA as additional security. Lake Forest then amended its complaint to add claims for wrongful foreclosure.

On December 27, 1988, the Federal Home Loan Bank Board declared GSA insolvent and appointed the FSLIC as receiver. The following day, the FSLIC entered into an agreement with what was the First Texas Bank. First State Bank acquired certain GSA assets, including the property formerly owned by Lake Forest, and took the name First Gibraltar.

In January, 1989, the FSLIC intervened in Lake Forest's suit and removed it to federal court. On July 27, 1989, the district court granted Lake Forest's motion for leave to join First Gibraltar as a party necessary for adjudication of rights to the property.

On March 26, 1991, after substitution of the FDIC for the FSLIC as receiver for GSA, the district court entered an order granting the FDIC's and First Gibraltar's respective motions for summary judgment. On April 28, 1991, the Fifth Circuit Court of Appeals affirmed the district court's summary judgment. *See Lake Forest Developments v. FDTC,* 989 F.2d 197 (5th Cir. 1993). Following this, Lake Forest submitted its Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Lake Forest's Petition for a Writ of Certiorari should be denied for two reasons. First, the Court of Appeals' decision conflicts with neither the prior holdings of the Fifth Circuit nor the decisions of other United States Courts of Appeals. In fact, the Court of Appeals correctly affirmed the District Court's Summary Judgment because Petitioner's claims are barred under the *D'Oench, Duhme* doctrine.

In its Petition for Certiorari, Lake Forest now contends that the bilateral contract exception to the *D'Oench* doctrine allows its claims to proceed. In its pleadings, Lake Forest sought to void the foreclosure sale of certain Lake Forest-owned properties, asserting that GSA had no justifiable cause for initiating foreclosure, and that any default by Lake Forest was directly attributable to an alleged breach of the Loan Agreement by GSA. The alleged breach, however, is founded upon an alleged oral waiver of certain provisions contained in the Loan Agreement. Thus, Lake Forest's claims run afoul of *D'Oench* because Lake Forest sought the benefit of a secret agreement which contradicted the express terms

of the Loan Agreement. In essence, Lake Forest sought to invalidate a facially valid instrument. Clearly, Lake Forest, by relying on the alleged oral waiver, lent itself to a scheme likely to mislead banking authorities. As such, Lake Forest's claims are barred by the *D'Oench, Duhme* doctrine and 12 U.S.C. § 1823(e).

By purchasing the asset at issue from FSLIC, as receiver for GSA, First Gibraltar acquired the protections afforded FSLIC under federal law. Although Lake Forest contends that the bilateral obligation exception to the *D'Oench* doctrine allows its claim to proceed, clear case law requires that Lake Forest's claim be barred.

Second, Petitioner has waived the claims made in its Petition for a Writ of Certiorari. Having lost on the claims it pleaded in the District Court, Petitioner now seeks a writ of certiorari based upon a new theory not advanced in its pleadings in the District Court or in the Court of Appeals. Because these new theories have been waived, this Court should deny the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH EITHER THE PRIOR HOLDINGS OF THE FIFTH CIRCUIT OR THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

The Fifth Circuit correctly affirmed the District Court based on the *D'Oench, Duhme* doctrine. Lake Forest's own pleadings establish that its claims were based on an alleged *oral* waiver of a written agreement. More specifically, Lake Forest alleged:

> GIBRALTAR I has waived and is estopped from relying on the provision of the March 30,

> 1977, Loan Agreement that it was not obligated to accept reappraisals based upon the words and actions of its agents who had actual or apparent authority to bind GIBRALTAR I.

See Appendix A, page 6a at ¶ 17.[2] Before this Court, Lake Forest takes the curious and highly unusual position that its pleadings are "irrelevant." More specifically, Lake Forest states:

> [a]fter discovery when it became clear that evidence of the [alleged] breaches of the loan agreement had been reduced to writing and were contained in the records of GSA, *the allegations of oral waiver became irrelevant* and were not pursued by Lake Forest.

Petition for Writ of Certiorari at p. 14 (emphasis added).

Lake Forest seeks to abandon its pleadings only because there are no grounds for issuance of a writ of certiorari based on the pleadings, evidence and arguments submitted to the Courts below. Thus, Lake Forest seeks to manufacture a conflict between the Court of Appeals' decision in this case and (1) the Fifth Circuit's prior decisions and (2) the decisions of other Courts of Appeals.

In this Court, Petitioner argues that the bilateral contract exception to *D'Oench is* applicable in this case. Because there was no breach of a bilateral contract, the Fifth Circuit's decision does not conflict with its prior decisions or other decisions of Courts of Appeals. Petitioner confuses written documents reflecting discussions of a potential loan modification which was never memorialized in a written, executed agreement, with an executed agreement contained in the books and records of a failed financial

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2. Petitioner did not include its Fourth Amended Original Petition among the documents included in its Appendix to its Petition for a Writ of Certiorari.

institution. In other words, there can be no bilateral contract exception until there is an executed, written contract.

In *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), the United States Supreme Court articulated a policy designed to preclude claims not appearing on the face of the records of a savings and loan or bank placed in receivership. In *D'Oench, Duhme*, this Court held that secret agreements designed to deceive the banking authorities, or that would tend to have that effect, may not be asserted as a defense against the FDIC suing in its corporate capacity. The underlying rationale of the rule is that banking authorities are entitled to rely on the books and records of a financial institution. Thus, a person who, to accommodate a bank, executes an instrument which is in the form of a binding obligation, is estopped from arguing that the parties agreed that the instrument would not be enforced. *D'Oench, Duhme*, 315 U.S. at 461; *FSLIC v. Wilson*, 722 F. Supp. 306, 312 (N.D. Tex. 1989).

D'Oench, Duhme and its progeny have since been extended far beyond the situation in which the lender and borrower secretly agree that an obligation will not be enforced. Moreover, Congress enacted Section 1823(e) of Title 12 which provides:

> [N]o agreement which tends to defeat the interest of the Corporation and any asset acquired by it under this section or section 1821 of this title, either as security for a loan of by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution, (3) was

> approved by the Board of Directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee and (4) has been, continuously, from the time of its execution, an official record of the depository institution.

This Court construed § 1823(e) expansively in *Langley v. FDIC*, 484 U.S. 86, 108 S. Ct. 396, 98 L. Ed 340 (1987). In *Langley*, the Langleys alleged that the insolvent bank had misrepresented certain existing facts upon which they relied in executing the note that was the subject of the lawsuit; however, no reference to the alleged representations appeared in the records of the failed bank. The Court held that under § 1823(e), a borrower who signs a facially unqualified note subject to unwritten conditions or understandings "has lent himself to a scheme or arrangement whereby the banking authority ... was likely to be mislead, whether the condition consists of performance of a counterpromise (as in *D'Oench, Duhme)*, or of the truthfulness of a warranted fact." *Id.* at 90; *accord Buchanan v. FSLIC*, 935 F.2d 83, 86 (5th Cir.), *cert. denied sub. nom. Buchanan v. First Gibraltar Bank, FSB*, __ U.S.__, 112 S. Ct. 639, 116 L. Ed. 2d 657 (1991). Accordingly, in *Langley*, the Court rejected the Langleys' claims and found them liable on the note.

As noted by the Fifth Circuit, the aims of both § 1823(e) and *D'Oench, Duhme* are identical, and the reasoning applied in § 1823(e) cases is applicable to *D'Oench, Duhme* cases. *Olney Savings & Loan Ass'n. v. Trinity Banc Savings* Ass'n., 885 F.2d 266, 274 (5th Cir. 1989). The Fifth Circuit has also extended the protections of *D'Oench, Duhme* to private parties, such as First Gibraltar, that purchase the assets of a failed institution from the FDIC (or formerly, the FSLIC). *Porras v. Petroplex Savings Ass'n.*, 903 F.2d 379, 381 (5th Cir. 1990). Thus, the policies and

protections arising from § 1823(e) and *D'Oench, Duhme* are applicable to this case.

In its petition Lake Forest asserts that the application of § 1823(e) and *D'Oench* to the case at hand is incorrect. Lake Forest further declares that the Fifth Circuit committed error when it "substantially departed from the accepted and usual course of judicial proceedings" by applying the *D'Oench* to the matter in issue. In particular, Lake Forest believes the Fifth Circuit's holding conflicts with prior decisions of both the Fifth Circuit, and other, circuit courts of appeal. This belief is incorrect.

As a predicate to its assertion of error, Lake Forest relies on the bilateral obligation exception to the *D'Oench* delineated in *Howell v. Continental Credit Corp.*, 655 F.2d 743 (7th Cir. 1981). *Howell* found an exception to *D'Oench* "where the document the FDIC seeks to enforce is one . . . which facially manifests bilateral obligations and serves as the basis of the [obligor's] defense." *Howell,* 655 F.2d at 746. Lake Forest contends that its action for wrongful foreclosure properly fell under the Howell exception and that the Fifth Circuit, in making its ruling, ignored the asserted exception.

It is unclear why Lake Forest feels the Fifth Circuit should have applied the Howell exception in this instance. GSA breached no "bilateral obligation" apparent from the face of the Loan Agreement. First Gibraltar grants that, based partially on reappraisals of the property in question, GSA did increase the amount of the note. However, this method of dealing practiced between GSA and Lake Forest was *never* memorialized by anything even remotely resembling an "agreement" as contemplated by either D'Oench or §1823(e). To the contrary, Lake Forest's own pleadings acknowledge that the Loan Agreement stated that GSA "did not have to make any increased loan on the basis of reappraisals." Plaintiff's Fourth Amended Complaint at Paragraph 11, Appendix "A" hereto at 4a.

There is not, and never was, any agreement requiring GSA to increase the loan based on reappraisals. Nevertheless, Lake Forest attempts to create such an agreement by relying on the existence of a few internal GSA Memoranda which contemplate possible loan increases ostensibly based on reappraisals. Lake Forest's attempted creation falls far short of both case law and statutory requirements for an agreement.

Thus, in its opinion below, the Fifth Circuit correctly observed, "[t]here is no claim (or evidence) of any written waiver or agreement to accept such a reappraisal." 989 F.2d at 201 n.1. Surely, had there been such a *written* waiver or modification *agreement,* Petitioner would have included the "Agreement" in its pleadings and in the Appendix to its Petition for a Writ of Certiorari.[3]

The Fifth Circuit in *FDIC v. Hamilton,* 939 F.2d 1225 (5th Cir. 1991) directly addressed the contentions Lake Forest makes in the present petition. *Hamilton* involved the FDIC's suit for collection on a note where the note's maker asserted a right to offset based on certain internal bank memos and bank minutes memorializing the bank's "obligations" concerning the timely financing of the loan. The alleged obligations were not contained in the agreement covering the loan. Ruling in the FDIC's favor, the Court first recognized the *Howell* bilateral obligation exception, then went on to hold that "[t]he Hamiltons, however, cannot avail themselves of this exception because the note upon which the Hamiltons base their claim does not facially manifest [the closed institutions] bilateral obligation." *Hamilton,* 939 F.2d at 1231. Despite the

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3. Petitioner's assertion that its own pleadings were outdated and did not reflect the state of discovery are unavailing in light of the absence of any motion to amend its Fourth Amended Original Petition. In fact, any effort by Petitioners to amend their pleadings to specifically delineate the existence of documents which did not rise to the level of an executed agreement would not have satisfied the requirements of the bilateral contract exception.

existence of documents purporting to evidence a course of dealing different than that contemplated by the Loan Agreement, the debtor's claims failed. Clearly memoranda do not an agreement make. Here, Lake Forest's artful compilation of documents, as with the Hamiltons previous, cannot create a breach of an agreement to increase the loan based on reappraisals when, in fact, no agreement ever existed. Lake Forest concedes as much in its own Petition by stating "To refuse to fund because of a concurrent refusal to accept a reappraisal under § 2.02 was a right that GSA clearly had under the Loan Agreement." Lake Forest's Petition for Writ of Certiorari, page 13. It is hard to imagine how GSA's exercising a right clearly provided for translates into a defense against enforcement of the note.

A decision similar to that in *Hamilton* was reached by the Sixth Circuit in *Hall v. FDIC,* 920 F.2d 334 (6th Cir. 1990), *cert. denied,* __U.S. __, 111 S. Ct. 2852, 115 L. Ed. 2d 1020 (1991). The borrowers in *Hall* sued the FDIC for breach of a Loan Agreement. The borrowers claimed that a letter agreement executed between the closed institution (whose assets the FDIC acquired) and another bank worked to relieve the borrowers of the requirement that the borrowers grant to the bank a first lien on certain property. The letter agreement was never incorporated into the original Loan Agreement, thus prompting the court to rule, "[T]he side agreement that the plaintiffs rely on is precisely the type of secret agreement barred by the Supreme Court in *D'Oench*. . . . Where a failed bank or thrift has breached a *written term of a Loan Agreement,* the obligor may, of course, sue the FDIC as receiver without the bar of the *D'Oench* doctrine. But where, as here, the breach asserted depends on a *side agreement that conflicts with the terms of the written Loan Agreement, a breach of contract claim cannot be sustained.*" *Hall,* 920 F.2d at 340-341 (emphasis added). The borrowers in Hall, actual agreement favoring their claim in hand, failed on their suit against the FDIC. Lake Forest presented even less, yet expected the Fifth Circuit to endorse their action.

Lake Forest cites the Fifth Circuit case of *FSLIC v. Mackie,* 962 F.2d 1144 (5th Cir. 1992) as support for its assertion of error committed. Lake Forest claims that the Fifth Circuit's holding in the case at hand conflicted with prior holdings of the court. In *Mackie,* the borrower made claims similar to those made by Lake Forest, namely that a breach of a fiduciary duty (*i.e.,* bilateral obligation) afforded a defense to enforcement of the note. The Fifth Circuit remanded the case for further fact finding and made no ruling as to the breach. In remanding, the Fifth Circuit *did* foreshadow its reasoning for the soon to come denial of Lake Forest's claim — "[Mackie] can, however, assert defenses that are based on obligations contained in the written Loan Agreement, *as long as he does not rely on any unrecorded agreements to support his allegations.*" *Mackie,* 962 F.2d at 1151 (emphasis added); *see also, Langley,* 484 U.S. 86, 108 S. Ct. 396, 98 L. Ed. 340 (1987). As previously pointed out by both Petitioners and Respondents, the written agreement contains no obligation requiring GSA to increase the loan based on reappraisals. Furthermore, Lake Forest has *no* agreement to support its allegations, much less an unrecorded one. The Fifth Circuit was correct in following the clear reasoning contained in one of its own decisions.

Under statutory analysis, Lake Forest's claims of breach and error fall even further a field. Cursory examination of the "agreement" on which Lake Forest bases its claims of breach reveals that the documents fail to meet two, and most likely three, of the necessities of § 1823(e). First, the memoranda relied on are all dated after the creation of the Loan Agreement and thus were not executed by both parties contemporaneously with the acquisition of the note. Second, the memoranda, since their is no "date of execution", by definition could not continuously be an official record of GSA. Third, although there is a single document bearing the signatures of GSA's executive committee, the document is, at most, an offer to renegotiate the loan and not, in any sense of the word, an agreement approved by GSA's loan

committee. The memoranda were written but, according to § 1823(e), this hardly amounts to an agreement that GSA could breach. With their decision in *Langley,* The Supreme Court concisely addressed the results of not meeting § 1823(e)'s requirements: "The short of the matter is that Congress opted for the certainty of the requirements set forth in § 1823(e). An agreement that meets them prevails . . ., and an agreement that does not meet them fails . . . . It would be rewriting the statute to hold otherwise. " *Langley,* 484 U.S. at 95, 108 S. Ct. at 403 . Accordingly, the Fifth Circuit was correct in its determination that Lake Forest's claim of "breach" was without merit.

Viewing the situation in light most favorable to Lake Forest, the actions GSA took amounted to a waiver of the relevant loan provision. This waiver was never incorporated into the Loan Agreement. *D'Oench* (along with § 1823 (e)) stands for the proposition that, in order to protect the FDIC from "misrepresentations as to the . . . assets in the portfolios of banks which [FDIC] insures," secret agreements that tend to deceive banking authorities cannot be raised as a defense against the FDIC when it seeks to enforce a note. *D'Oench,* 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942). The "agreement" Lake Forest attempted to raise as a defense is one that would deceive banking authorities and, as such, was correctly barred as a basis for defending against the note's enforcement. Even assuming that Lake Forest could establish the existence of a "bilateral contract", the claims asserted by Lake Forest do not run against First Gibraltar. The summary judgment evidence established that First Gibraltar did not assume unsecured obligations of GSA. Additionally, the summary judgment evidence submitted by the FDIC established that GSA's receiver had no assets from which a judgment could be satisfied. *See* Order granting FDIC's Motion for Summary Judgment, Appendix "B" hereto at 13a. The Fifth Circuit has consistently held that unsecured claims, which have been determined "worthless" in connection with the closing of the failed institution, cannot be

revived and asserted against the acquiring institution. *See, e.g., First Indiana, FSB v. FDIC,* 964 F.2d 503, 506-7 (5th Cir. 1992); *Santopadre v. Pelican Homestead & Savings Assn.,* 937 F.2d 268, 272 (5th Cir. 1991). Instead, the claims are relegated to payment, if any,[4] by the receiver *after* general depositors, pursuant to Texas depositor preference statute. *First Indiana,* 964 F.2d at 506; *Gulley v. Sunbelt Savings, F.S.B.,* 902 F.2d 348, 351 (5th Cir. 1990), *cert. denied,* 498 U.S. 1025, 111 S. Ct. 673, 112 L. Ed. 2d 665 (1991). These cases moot Lake Forest's contention that it is entitled to pursue its claims under the bilateral contract doctrine. *Mackie* and *RTC v. Oaks Apartment Joint Venture,* 966 F.2d 995 (5th Cir. 1992) both involved claims against the *receiver* under a bilateral contract. In short, the bilateral contract exception is of little consequence because whatever claims Lake Forest may have: (1) can only be asserted against GSA's receiver; and (2) are worthless.

Lake Forest, perhaps realizing the futility of its claim of breach based on the reappraisal issue, also contends that GSA breached the Loan Agreement when, in an offer to create a new loan, GSA requested that the new loan contain a personal guarantee from John McMackin (a participant in the Lake Forest joint venture). § 5.01 of the Loan Agreement reads: "Liability. The monetary obligation of Owner [Lake Forest] shall be non-recourse with Owner assuming no liability for repayment. [GSA] agrees to look exclusively to the security for repayment of such monetary obligations." Lake Forest's Petition for Writ, Appendix G, page App. 32. GSA never looked beyond the security for *repayment* of the note. GSA *did* seek a personal guarantee in connection with negotiating a new note, but requesting personal liability for a potential loan modification does not constitute a breach of the existing Loan Agreement. If GSA had looked to McMackin for repayment of funds previously advanced, Lake Forest's claim of

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4. Because unsecured claims against GSA were determined worthless, Lake Forest has no claim against the receiver.

breach would hold more weight. As it is, Lake Forest's complaint amounts to nothing more than dislike of GSA's negotiating position;[5] requesting a personal guaranty is not looking to the maker for repayment under a note. Additionally, requiring partners to guarantee a nonrecourse partnership debt does not conflict with a note's provisions that it is nonrecourse. *See FDTC v. Singh,* 977 F.2d 18, 22-3 (lst Cir. 1992); *RTC v. Northpark Joint Venture,* 958 F.2d 1313, 1320-1 (5th Cir. 1992), *cert denied, Dannis v. RTC,* __ U.S. __, 113 S. Ct. 963, 112 L. Ed. 2d 120 (1993). No degree of tortured provision-reading or mischaracterization of events can manufacture a breach where none exists. Simply put, GSA did nothing wrong, and certainly nothing in contravention of the agreement such that the Fifth Circuit needed rule in Lake Forest's favor.

II.

LAKE FOREST FAILED TO PLEAD THE CLAIMS ON WHICH IT SOUGHT RELIEF, AND THEREFORE, HAS WAIVED SUCH CLAIMS.

A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. *Standard Oil Co. v. State of Missouri,* 224 U.S. 270, 34 S. Ct. 406, 56 L. Ed. 760; *Reynolds v. Stockton,* 140 U.S. 254, 11 S. Ct. 773, 35 L. Ed. 464; *Sylvan Beach v. Roch,* 140 F.2d. 852 (8th Cir. 1944). In deciding the case at hand the Fifth Circuit held correctly that the District Court's summary judgment was proper. Both the pleadings and the evidence supported the District Court's ruling. The heart of Lake Forest's Fourth Amended Petition, its

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5. Thus, the memoranda in Petitioner's Appendix coupled with Petitioner's allegations make clear there was no meeting of the minds concerning the alleged oral modification. Accordingly, there was no *agreement* to which the bilateral contract exception could apply.

final pleading, alleged that GSA had failed and refused to advance adequate funds based upon acceptable reappraisals and, that based upon the words and actions of GSA's agents, GSA had waived and was estopped from relying on the provision of the Loan Agreement stating that GSA was not obligated to accept reappraisals. *See* Lake Forest's Fourth Amended Original Petition, paragraphs 16 and 17, Appendix "A" hereto at 6a. No mention was made of Lake Forest's belief in the existence of a written "agreement" evidencing GSA's obligation to fund based on reappraisals. Also, the petition failed completely to reference the alleged breach of the Loan Agreement provision precluding personal liability. Lake Forest's Petition for Writ states: "After discovery when it became clear that evidence of the breaches of the Loan Agreement had been reduced to writing and were contained in the records of GSA the allegations of oral waiver became irrelevant and were not pursued by Lake Forest." Lake Forest's Petition for Writ, page 14. First Gibraltar, in addition to disputing the breaches, asks the question: If Lake Forest believed it had new evidence and new claims and was thus dropping its pursuit of the alleged oral waiver, why did it not amend its pleadings to reflect these new beliefs and claims? Speaking on pleadings, the Eighth Circuit states: "A party is no more entitled to recover upon a claim not pleaded than he is to recover upon a claim pleaded but not proved. The foregoing rules are all fundamental and state nothing more than the essentials of due process and fair play. . .. They cannot be circumvented by allowing amendments to pleadings to change a cause of action after judgment. . . ." *Sylvan Beach,* 140 F.2d at 862. Lake Forest pleaded a claim for relief based on an oral waiver. The courts below correctly held that both *D'Oench* and § 1823(e) barred this claim. Thus, the Petition for Certiorari should be denied.

CONCLUSION

At its simplest, Lake Forest is attempting to avoid the effect of an instrument, valid on its face, by alleging a breach of certain side agreements which contradict the express terms of the instrument, and by alleging breach of the instrument itself. Lake Forest can only void First Gibraltar's note by presenting proper evidence proving the validity of these side agreements, and by presenting proper evidence proving a breach of the actual instrument occurred. Lake Forest has done neither. First Gibraltar, as transferee from the FSLIC, is entitled to the protections afforded by *D'Oench* and § 1823(e). As such, Lake Forest's claims must fail, and the Court's opinion below was in all things correct.

Respectfully submitted,

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APPENDIX A — PLAINTIFF'S FOURTH AMENDED ORIGINAL PETITION FILED JULY 27, 1989

In The United States District Court
for the Northern District of Texas
Fort Worth Division

Civil Action No.
CA 4-89-00094K

Judge David O. Belew, Jr.

Lake Forest Developments,

Plaintiff,

vs.

The Federal Savings and Loan Insurance Corporation as Receiver for Gibraltar Savings Assocation, Houston, Texas; David Osborne, Trustee; and First Gibraltar Bank FSB, Houston, Texas,

Defendants.

PLAINTIFF'S FOURTH AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES LAKE FOREST DEVELOPMENTS, Plaintiff in the above-numbered and entitled cause, complaining of GIBRALTAR SAVINGS ASSOCIATION (Gibraltar I) and FIRST GIBRALTAR BANK, FSB (Gibraltar II), and for cause of action would respectfully show:

Appendix A

PARTIES

1. Plaintiff, LAKE FOREST DEVELOPMENTS, is a joint venture organized under Texas law with all venturers, John W. McMackin and Robert G. West, residing and being domiciled in Tarrant County, Texas.

2. Defendant GIBRALTAR SAVINGS ASSOCIATION (Gibraltar I) is a Texas savings and loan association with a regional office in Fort Worth, Tarrant County, Texas, and has already been served with process and has filed an answer in this proceeding.

3. Defendant FIRST GIBRALTAR BANK is a federal stock savings bank organized under the laws of the United States whose address is 13401 North Freeway, Houston, Harris County, Texas 77060, where service of process may be obtained.

4. Defendant FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION ("FSLIC") has appeared in this action as *Receiver* for GIBRALTAR SAVINGS ASSOCIATION (Gibraltar I), removing this action from the Tarrant County District Court.

5. This suit is filed pursuant to the provisons of TEX. BUS. COM. CODE ANN. § 17.41 et. seq., commonly known as the Deceptive Trade Practices and Consumer Protection Act and hereinafter referred to as the DTPA, upon the grounds that the acts and practices described herein are prohibited by this statute. Plaintiff is a "consumer" as that term is defined in the DTPA. Defendant, GIBRALTAR SAVINGS ASSOCIATION (GIBRALTAR I), was the seller and/or provider of services to Plaintiff, LAKE FOREST DEVELOPMENTS, consisting of but not limited to the lending of money and provision of real estate

counseling and expertise in connection with Plaintiff's acquisition and development of approximately seventy-five (75) acres in the Trophy Club subdivision.

FACTS

6. Prior to March, 1977, the predecessor of the Plaintiff was the Trophy Club Joint Venture, in which John W. McMackin, Ben Hogan, and Johnson-Loggins, Inc., were participants. Defendant GIBRALTAR I advanced funds for development of the Trophy Club Joint Venture under a profit participation agreement executed in June, 1973. In 1977, at the request and insistence of GIBRALTAR I, the Trophy Club Joint Venture was dissolved, with Johnson-Loggins withdrawing and GIBRALTAR assuming control of and ownership of the property and project, with the exception of 75 acres deeded to Hogan and McMackin. Hogan and McMackin also retained a one-third (1/3) net profit interest in the Trophy Club.

7. Because of the change of the joint venture, the participants (including McMackin) would have been liable for the federal income tax consequences of a recapture of losses taken in previous years and lost years of valuable effort. In consideration of this consequence, GIBRALTAR I agreed to sell approximately 75 acres to the individual participants and finance future development of the whole property, with GIBRALTAR I having control and veto over the development. GIBRALTAR I also provided interim and permanent financing to the customers of the joint venture. The successor joint venture is LAKE FOREST DEVELOPMENTS, the Plaintiff, and McMackin is a 95% participant in the joint venture.

8. On March 30, 1977, Defendant GIBRALTAR I entered

into an agreement to provide all development funds to Johnson-Loggins, Inc. This right was assigned to Plaintiff. On March 30, 1977, Johnson-Loggins executed a $1,800,000 note to GIBRALTAR I. This non-recourse note was assumed by Plaintiff. At the time, Plaintiff had submitted no development plan or budget to GIBRALTAR I pursuant to the terms of the March 30, 1977, Loan Agreement.

9. In October, 1977, Hogan asked to withdraw from the Trophy Club project. GIBRALTAR I and McMackin consented and it was agreed that McMackin would withdraw from his right to the net profits and actually develop the 75 acres which had been deeded to him on March 30, 1977. GIBRALTAR I agreed to advance development funds under the terms of that agreement.

10. Because McMackin was not experienced in land development he hired Norman Tobleman to manage the project. Budgets were prepared for a partial development of the 75 acres. This was submitted under the Loan Agreement of March 30, 1977. Because only a partial budget and development plan was submitted, McMackin needed to be assured he could request further development funds for those portions of the land not covered by the initial budget.

11. The Loan Agreement of March 30, 1977, stated that GIBRALTAR I did not have to make any increased loan on the basis of reappraisals. No appraisals or budgets were submitted for the $1,800,000 note. Appraisals were submitted in November of 1978 and March of 1979 on the basis of which the loan note was increased to $2,960,000 on May 29, 1979.

12. In February, 1978, Charles Ackerman, Vice President of GIBRALTAR I, acting in the scope and course of his employment,

represented to McMackin and Tobleman that GIBRALTAR I would not refuse to issue commitments to advance development funds based upon reappraisals if LAKE FOREST was in fact developing the property pursuant to the Loan Agreement and terms set by GIBRALTAR I. McMackin relied upon this assurance in proceeding to develop the property in phases.

13. In March, 1979, Wiley Wisely, Executive Vice President of GIBRALTAR I, acting in the scope and course of his employment, represented to McMackin and Tobleman that GIBRALTAR I would not refuse to make development loans based upon reappraisals if LAKE FOREST was developing the land pursuant to the Loan Agreement. McMackin relied upon this assurance and presented the second phase of partial development of the 75 acres.

14. Plaintiff, pursuant to the agreement, on or about May 29, 1979, executed a note to GIBRALTAR I in the principal amount of $2,960,000. The Plaintiff also executed a deed of trust, which was subsequently recorded in Volume 529, Page 919, Deed of Trust Records, Denton County, Texas, covering the development property for the benefit of GIBRALTAR I in order to secure payment of the $2,960,000 note. Plaintiff, pursuant to the terms of the agreement, continued to satisfactorily develop the property.

15. In the fall of 1980, Plaintiff again requested that Defendant GIBRALTAR advance further development funds pursuant to the terms of the loan agreement between the parties based upon an acceptable reappraisal of such property. Ackerman recommended that this increase in the available development funds be approved by GIBRALTAR I. These funds would have completed the development of the 75 acres. It was the obligation of GIBRALTAR I to advance development funds to complete the project.

Appendix A

16. Defendant GIBRALTAR I has failed and refused and continues to fail and refuse to advance adequate development funds based upon acceptable reappraisals, or on any basis, for the development of the property in accordance with the March 30, 1977, Loan Agreement. Such failure and refusal on the part of Defendant GIBRALTAR I to advance such funds constitutes a breach of the agreement between the parties.

17. GIBRALTAR I has waived and is estopped from relying on the provision of the March 30, 1977, Loan Agreement that it was not obligated to accept reappraisals based upon the words and actions of its agents who had actual or apparent authority to bind GIBRALTAR I.

18. On August 11, 1981, Plaintiff filed suit in the District Court of Tarrant County, 17 Judicial District, alleging breach of contract by Defendant GIBRALTAR I.

19. Because of the uncertain quantity and difficulty in proof of damages, Plaintiff sought specific enforcement of the agreement between Plaintiff and Defendant GIBRALTAR I. (See Plaintiff's Original Petition.)

20. In the alternative, Plaintiff sought damages in an amount of approximately $1,250,000 for its inability to continue proper development of the property, for the tax consequences thereof, and for loss of profits. (See Plaintiff's Original Petition)

Count I

21. By letter dated May 23, 1983, from the attorneys for GIBRALTAR I, Plaintiff was notified that GIBRALTAR I intended to foreclose and sell at public sale on June 2, 1983, a total of 21

certain promissory notes belonging to Plaintiff. Such notes had been collaterally assigned to GIBRALTAR I to additionally secure GIBRALTAR I with respect to funds advanced for development of the property. Included with the letter from GIBRALTAR I was a copy of a notice which was apparently posted at the Denton County Courthouse, and a copy of which notice is attached as Exhibit A to this petition and made a part hereof for all purposes.

22. By letter dated May 27, 1983, counsel for the Plaintiff objected to the notice attached as Exhibit A in that the notice failed to adequately describe the notes to be sold, their principal amount, the interest rate, the Maker, and remaining period of time to be paid. In addition the notice stated that the notes would be sold at the public sale in bulk to the highest bidder for cash. By the terms of the May 27, 1983, letter from counsel for the Plaintiff the Defendant was made aware of the numerous defects in the notice of the sale and was urged not to hold the sale at least until an adequate notice of the sale was prepared and posted, but GIBRALTAR I failed to correct any of such deficiencies. A copy of said letter dated May 27, 1983, is attached as Exhibit B to this petition and made a part hereof for all purposes.

23. On June 2, 1983, GIBRALTAR I held a sale at the courthouse door in Denton County, Texas, and entertained bids for the 21 promissory notes. A representative for Plaintiff was present for the sale and again requested that GIBRALTAR I not conduct the sale, but GIBRALTAR I refused to postpone or cancel the sale. GIBRALTAR I was the only party bidding at such sale and was thus the successful bidder for the notes. GIBRALTAR I indicated that it intended to contact the makers of such notes and request future payments be made directly to GIBRALTAR I.

24. Plaintiff would request the Court to set aside the sale of

the 21 promissory notes held on June 2, 1983, and decree such sale void for the reason that GIBRALTAR I failed to give proper notice of such proposed sale. In addition, any default of the Plaintiff under the terms of its development loan note to GIBRALTAR I is directly attributable to the breach of GIBRALTAR I under the terms of the loan agreement. As a result GIBRALTAR I was without authority to initiate foreclosure proceedings on such notes and GIBRALTAR I's actions in conducting the sale and receiving direct payments on the notes has damaged the Plaintiff. LAKE FOREST would request the Court to set aside such sale, restore the title of notes to LAKE FOREST DEVELOPMENTS, and require an accounting from GIBRALTAR I for any funds received by it on such notes.

Count II

25. Plaintiff repeats and realleges the allegations set forth in paragraphs 5-23 hereof as if fully set forth herein.

26. on or about May 16, 1983, Ronald E. Banks, Substitute Trustee, executed a Notice of Substitute Trustee's Sale to sell the property belonging to LAKE FOREST pursuant to the terms of the Deed of Trust dated May 29, 1979, from LAKE FOREST to John T. Simmons, Trustee for the benefit of GIBRALTAR I, which Deed of Trust is recorded in Volume 528, Page 919, Deed of Trust Records, Denton County, Texas. A copy of such Notice of Substitute Trustee's Sale, including the legal description of the property is attached as Exhibit C to this petition and is made a part hereof for all purposes.

27. On June 7, 1983, a trustee's sale was held at the door of the Denton County Courthouse. Officers from GIBRALTAR I's Fort worth office conducted the sale as Substitute Trustee and as a bidder for the property. Such individuals were acting at the

instance and request of GIBRALTAR I. A representative of LAKE FOREST was present for the foreclosure sale and requested that GIBRALTAR I not conduct the sale, but GIBRALTAR I refused to postpone or cancel the sale. GIBRALTAR I was the only bidder for the property, and was therefore the successful bidder at the foreclosure sale.

28. The Plaintiff would request the Court to set aside the trustee's sale held on June 7, 1983, and covering the real property described in Exhibit B to this petition, and hold the same void for the reason that the Defendant had no justifiable cause for initiating foreclosure proceedings. Any default of the Plaintiff's development loan note is directly attributable to the breach of the loan agreement by GIBRALTAR I. Because GIBRALTAR I lacked authority to initiate the trustee's sale, such sale is void and without force in law and LAKE FOREST should be decreed the owner of such property.

Count III

29. The conduct and statements of Defendant GIBRALTAR I more particularly described above in Paragraphs 5 through 27 constitute a breach of covenant of good faith and fair dealing under common law and violate statutory provisions 1.203 and 1.201(19) Texas Business and Commerce Code.

30. Each false, misleading, or deceptive act of Defendant was knowingly committed by Defendant and some one or all of same, independently or concurrently, were the producing cause of Plaintiff's damages.

31. On July 11, 1983, Plaintiff filed a Notice of Lis Pendens with the county clerk of Denton County, Texas, referencing the real

property subject to said trustee's sale. A copy of said Notice of Lis Pendens is attached as Exhibit D to this petition and made a part hereof for all purposes. The Notice of Lis Pendens constitutes constructive notice of this underlying lawsuit to regain title to said property, placing any and all prospective buyers of said property that any interest acquired in said property is subject to the outcome of this lawsuit.

32. Subsequent to July 11, 1983, and continuing until approximately December, 1988, Plaintiff and Defendant GIBRALTAR I conducted pretrial discovery and protracted settlement negotiations.

33. Plaintiff has recently received information indicating that said real property has been purportedly sold to First Gibraltar Bank, FSB (Gibraltar II). Said purported sale of real property was on information and belief executed on or about January 20, 1989.

34. At the time of purchase by Gibraltar II of said real property, prior to, and at all times subsequent, Gibraltar II was on notice that an interest in said real property purchased by Gibraltar II was subject to the outcome of this lawsuit.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays as follows:

1. The Court set aside the sale of 21 certain promissory notes payable to the order of LAKE FOREST DEVELOPMENTS and return title of such notes to the Plaintiff and further that GIBRALTAR I be required to account to LAKE FOREST for any funds received on such notes.

2. The Court set aside the trustee's sale for the real property

owned by LAKE FOREST DEVELOPMENTS and decree that such sale is void and that title to such property remains in the Plaintiff.

3. The Court decree that any and all interest purchased by Defendant Gibraltar II in the real property owned by Lake Forest Developments is void and null, any such interest having been contingent upon the outcome of this lawsuit and purchased by Gibraltar II with actual or constructive notice of said contingency.

4. The Court decree that Defendant Gibraltar I and subsequently Defendant FSLIC did not hold title to the real property owned by Lake Forest Developments and therefore any purported transfer of title to said real property by the Defendants was null and void.

5. The Court order that any amount remaining due pursuant to said loan agreement (if any) be reduced in an amount equal to damages sustained by Plaintiff and caused by Defendant GIBRALTAR I's wrongful and unlawful conduct.

6. The Court award Plaintiff such other relief as Plaintiff may show itself to be justly entitled.

Respectfully submitted,

BROWN, HERMAN, SCOTT, DEAN & MILES

By s/ David Broiles
R. DAVID BROILES (03054500)

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Fort Worth, TX 76102
(817)332-1391 Metro 429-0851

ATTORNEYS FOR PLAINTIFF

Appendix A

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copy of the foregoing Plaintiff's Fourth Amended Original Petition has been mailed first class prepaid to Defendant's attorneys of record, Pettit & Martin, 600 N. Pearl Street, Plaza of the Americas, LB 183, Dallas, TX 75201, in accordance with the Federal Rules of Civil Procedure on this ___ day of June, 1989.

R. David Broiles

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION FILED MARCH 26, 1991

CIVIL ACTION NO. CA4-89-094-A

LAKE FOREST DEVELOPMENTS,

Plaintiff,

VS.

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR GIBRALTAR SAVINGS ASSOCIATION, ET AL,

Defendant.

ORDER

Came on for consideration the motion of defendant Federal Deposit Insurance Corporation as receiver for Gibraltar Savings Association ("FDIC receiver"), for summary judgment. The court, having considered the motion, the summary judgment evidence, and the response of plaintiff, Lake Forest Developments, thereto, finds that the motion is well-taken and should be granted. The court finds that FDIC receiver does not possess any assets from which recovery on a judgment against it can ever be had. *Triland Holdings & Co. v. Sunbelt Service Corp.*, 884 F.2d 205 (5th Cir. 1989).

The court ORDERS that FDIC receiver's motion for summary judgment be and is hereby granted and plaintiff's claims against FDIC receiver be and are hereby dismissed. As between plaintiff and FDIC receiver, all costs shall be borne by plaintiff.

Appendix B

SIGNED March 26, 1991.

s/ John McBryde
JOHN McBRYDE
United States District Judge